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Issue 5 *A Tribute to Franklin D. Cleckley: A Compendium of Essential Legal Principles From His Opinions as a Justice on the West Virginia Supreme Court of Appeals*

Article 24

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Appellate Procedure

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> Pursuant to W. Va. Code § 3-5-23(a) (1986), the deadline for filing with the secretary of state the certificate and fee for a person seeking ballot access as a candidate for the office of president or vice-president as the nominee of a third-party otherwise qualifying for inclusion on the general election ballot by method other than primary election is the first day of August preceding the general election, and such persons are not required to file a declaration of candidacy pursuant to W. Va. Code § 3-5-7 (1991).[438]

D. *Setting Aside an Election*

State ex rel. Sowards v. County Commission of Lincoln County[439] examined nullification of an election. Justice Cleckley wrote that "[t]o achieve the goal of enfranchisement wherever possible, judicial authority to take a candidate off the ballot, especially after the voters have expressed their preference in a primary election, should be sparingly used."[440] The opinion then held

> [p]olitical candidacy is a fundamental interest which can be trod upon only if less restrictive alternatives are not available. It is only when an election has been subverted by a candidate's clear constitutional or statutory disqualification, bribery, fraud, intimidation, or similar unlawful conduct that a court should invalidate the preference of the voters and, in effect, annul the election. Therefore, a mere violation of W. Va. Code, 7-14-15(a) (1971), prohibiting deputy sheriffs from engaging in partisan political activity, is insufficient to set aside an election and, in effect, disenfranchise the voters of a county.[441]

XX. APPELLATE PROCEDURE

A. *Appellate Jurisdiction*

In order for the West Virginia Supreme Court of Appeals to hear and decide

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438 *Id.* at Syl. Pt. 2.

439 474 S.E.2d 919 (W. Va. 1996).

440 *Id.* at Syl. Pt. 7.

441 *Id.* at Syl. Pt. 8.

upon the merits of a case, it must have jurisdiction over the matter. In *James M.B. v. Carolyn M.*[442] the issue of jurisdiction presented itself:

> A court of limited appellate jurisdiction is obliged to examine its own power to hear a particular case. This Court's jurisdictional authority is either endowed by the West Virginia Constitution or conferred by the West Virginia Legislature. Therefore, this Court has a responsibility sua sponte to examine the basis of its own jurisdiction.[443]

The opinion concluded that "[w]here neither party to an appeal raises, briefs, or argues a jurisdictional question presented, this Court has the inherent power and duty to determine unilaterally its authority to hear a particular case. Parties cannot confer jurisdiction on this Court directly or indirectly where it is otherwise lacking."[444]

It was also said in *James M.B.* that "[u]nder W. Va. Code, 58-5-1 (1925), appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined."[445]

In *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc*,[446] the issue of determining whether an order dismissing a case is a final appealable order was addressed:

> The key to determining if an order is final is not whether the language from Rule 54(b) of the West Virginia Rules of Civil Procedure is included in the order, but is whether the order approximates a final order in its nature and effect. We extend application of this rule to a motion to dismiss under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.[447]

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442 456 S.E.2d 16 (W. Va. 1995).

443 *Id.* at Syl. Pt. 1.

444 *Id.* at Syl. Pt. 2.

445 *Id.* at Syl. Pt. 3.

446 461 S.E.2d 516 (W. Va. 1995).

447 *Id.* at Syl. Pt. 1.

In *Coleman v. Sopher*,[448] the issue of appellate jurisdiction was addressed in the context of a party obtaining a new trial, but attempting an appeal nonetheless:

> When a party agrees to or requests a new trial, and a new trial is granted because of the agreement or request, a denial of appellate review is justified on the ground that the party has elected to accept the new trial and should be bound, as if the party had entered a settlement agreement to forego appeal of the order granting a new trial.[449]

The issues of ripeness for appeal and the running of the appeal clock were discussed in *McCormick v. Allstate Insurance Co.*:[450]

> A motion made pursuant to Rule 59(a) of the West Virginia Rules of Civil Procedure and filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for an appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion.[451]

B. Standards of Review

1. Admissibility of a Confession

The standard of review by the West Virginia Supreme Court of Appeals in determining the admissibility of a confession was set out in *State v. Farley*:[452]

> This Court is constitutionally obligated to give plenary, independent, and de novo review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases

448 459 S.E.2d 367 (W. Va. 1995).

449 *Id.* at Syl. Pt. 4.

450 459 S.E.2d 359 (W. Va. 1995).

451 *Id.* at Syl. Pt. 4.

452 452 S.E.2d 50 (W. Va. 1994).

> suggesting deference in this area continue, but that deference is limited to factual findings as opposed to legal conclusions.[453]

Farley further held, "[i]n circumstances where a trial court admits a confession without making specific findings as to the totality of the circumstances, the admission of the confession will nevertheless be upheld on appeal, but only if a reasonable review of the evidence clearly supports voluntariness."[454]

2. Criminal Jury Instructions

It was noted in *State v. Hinkle*[455] that "[a]s a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is de novo."[456]

The case of *State v. Derr*[457] presented an opportunity to clarify how the West Virginia Supreme Court of Appeals reviews jury instruction assignments of error. Justice Cleckley indicated that "[w]hether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution."[458] The opinion then set out the circumstances that would permit reversal of a case based upon the refusal of a trial court to give a requested jury instruction:

> A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to

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453 *Id.* at Syl. Pt. 2.

454 *Id.* at Syl. Pt. 3.

455 489 S.E.2d 257 (W. Va. 1996).

456 *Id.* at Syl. Pt. 1.

457 451 S.E.2d 731 (W. Va. 1994).

458 *Id.* at Syl. Pt. 12.

effectively present a given defense.[459]

Justice Cleckley revisited appellate review of jury instructions in *State v. Bradshaw*:[460]

> Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as it accurately reflects the law. Deference is given to the circuit court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed for an abuse of discretion.[461]

The case of *State v. Guthrie*[462] provided elaboration on appellate review of criminal jury instructions:

> A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.[463]

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459 *Id.* at Syl. Pt. 11.

460 457 S.E.2d 456 (W. Va.1995).

461 *Id.* at Syl. Pt. 15.

462 461 S.E.2d 163 (W. Va. 1995).

463 *Id.* at Syl. Pt. 4.

3. Civil Jury Instructions

In the civil case of *Tennant v. Marion Health Care Foundation, Inc.*,[464] Justice Cleckley held that

> [t]he formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard. A verdict should not be disturbed based on the formulation of the language of the jury instructions so long as the instructions given as a whole are accurate and fair to both parties.[465]

4. Motion to Suppress

Justice Cleckley took a moment in *State v. Stuart*[466] to set out the general standard of review used by the West Virginia Supreme Court of Appeals in examining a motion to suppress ruling. The opinion held that

> [o]n appeal, legal conclusions made with regard to suppression determinations are reviewed de novo. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.[467]

Further elucidation on the review standard of a motion to suppress ruling was set out in *State v. Lacy*:[468]

> When reviewing a ruling on a motion to suppress, an appellate court should construe all facts in the light most favorable to the State, as it was the prevailing party below. Because of the highly fact-specific nature of a motion to suppress, particular deference is

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464 459 S.E.2d 374 (W. Va. 1995).

465 *Id.* at Syl. Pt. 6.

466 452 S.E.2d 886 (W. Va. 1994).

467 *Id.* at Syl. Pt. 3.

468 468 S.E.2d 719 (W. Va. 1996).

> given to the findings of the circuit court because it had the opportunity to observe the witnesses and to hear testimony on the issues. Therefore, the circuit court's factual findings are reviewed for clear error.[469]

The opinion went on to illuminate the review for a specific type of suppression ruling:

> In contrast to a review of the circuit court's factual findings, the ultimate determination as to whether a search or seizure was reasonable under the Fourth Amendment to the United States Constitution and Section 6 of Article III of the West Virginia Constitution is a question of law that is reviewed de novo. Similarly, an appellate court reviews de novo whether a search warrant was too broad. Thus, a circuit court's denial of a motion to suppress evidence will be affirmed unless it is unsupported by substantial evidence, based on an erroneous interpretation of the law, or, based on the entire record, it is clear that a mistake has been made.[470]

5. Injection of Unlawful Factors in a Criminal Case

The decision in *State v. Guthrie*[471] carved out a tough standard of review for alleged injections of specific unlawful factors in a criminal case:

> Appellate courts give strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases. Where these issues are wrongfully injected, reversal is usually the result. Where race, gender, or religion is a relevant factor in the case, its admission is not prohibited unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.[472]

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469 *Id.* at Syl. Pt. 1.

470 *Id.* at Syl. Pt. 2.

471 461 S.E.2d 163 (W. Va. 1995).

472 *Id.* at Syl. Pt. 9.

6. Discovery Violation

In *State ex rel. Rusen v. Hill*,[473] Justice Cleckley was able to address the critical issue of criminal prosecution discovery violations. The opinion concisely laid out the West Virginia Supreme Court of Appeals' analysis of prejudice caused by discovery violations. Justice Cleckley wrote that "[t]he traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the West Virginia Rules of Criminal Procedure involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case."[474]

7. Summary Judgment

In *Painter v. Peavy*,[475] the West Virginia Supreme Court of Appeals' standard of review for summary judgment was succinctly articulated. Justice Cleckley ruled that "[a] circuit court's entry of summary judgment is reviewed de novo."[476]

8. Partial Final Judgment Order

The standard of review of a final judgment order disposing of some claims or parties, but not all, was set out in *Province v. Province*:[477]

> In reviewing a circuit court's certification under Rule 54(b) of the West Virginia Rules of Civil Procedure, this Court applies a two-prong test. First, we scrutinize de novo the circuit court's evaluation of the interrelationship of the claims, in order to decide whether the circuit court completely disposed of one or more claims, which is a prerequisite for an appeal under this rule. As to the second prong of the inquiry under the rule – whether there is any just reason for delay – this Court accords the circuit court's determination considerably more deference than its first-prong

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473 454 S.E.2d 427 (W. Va. 1994).

474 *Id.* at Syl. Pt. 2.

475 451 S.E.2d 755 (W. Va. 1994).

476 *Id.* at Syl. Pt. 1.

477 473 S.E.2d 894 (W. Va. 1996).

> determination. The circuit court's assessment that there is "no just reason for delay" will not be disturbed unless the circuit court's conclusion was clearly unreasonable, because the task of balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case.[478]

9. Motion to Dismiss

The standard of review of an order dismissing a complaint was set out in *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*[479] The opinion held that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is de novo."[480]

10. Case Transfer Ruling

The decision in *State ex rel. Smith v. Maynard*[481] addressed two requirements for the West Virginia Supreme Court of Appeals to review a case transfer ruling under West Virginia Code section 56-1-1(b). First, it was held that "[i]n order for this Court to review a circuit court's decision under the factors listed under W. Va. Code, 56-1-1(b) (1986), the circuit court must provide a sufficiently detailed record that shows the basis for its decision."[482] Second, "[w]here a circuit court does not abuse its discretion in transferring cases under W. Va. Code, 56-1-1(b) (1986), this Court will not prohibit such transfer."[483]

The case of *Cannelton Industries, Inc. v. Aetna Casualty & Surety Co. of America*[484] also gave Justice Cleckley an opportunity to succinctly set out the basis upon which the West Virginia Supreme Court of Appeals would reverse a *forum non conveniens* ruling. The decision held that "[a] circuit court's decision to invoke the doctrine of forum non conveniens will not be reversed unless it is found that the

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478 *Id.* at Syl. Pt. 1.

479 461 S.E.2d 516 (W. Va. 1995).

480 *Id.* at Syl. Pt. 2.

481 454 S.E.2d 46 (W. Va. 1994).

482 *Id.* at Syl. Pt. 8.

483 *Id.* at Syl. Pt. 7.

484 460 S.E.2d 1 (W. Va. 1994).

circuit court abused its discretion."[485]

11. Judgment Notwithstanding the Verdict

The case of *Mildred L.M. v. John O.F.*[486] enabled Justice Cleckley to establish a bright line for the West Virginia Supreme Court of Appeals in reviewing a ruling on a motion for judgment notwithstanding the verdict:

> In reviewing a trial court's ruling on a motion for a judgment notwithstanding the verdict, it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. Its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, in ruling on a motion for a judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the nonmoving party. If on review, the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of this Court to reverse the circuit court and to order judgment for the appellant.[487]

12. Ruling on Property Sold under Specific Statute

The sale of property by the division of highways pursuant to West Virginia Code section 17-2A-19 was at issue in *Mills v. Van Kirk*.[488] The *Mills* opinion set out the West Virginia Supreme Court of Appeals' review when it examines decisions construing the statute by the division's commissioner and circuit courts:

> A circuit court's interpretation of W. Va. Code, 17-2A-19, is entitled to no special deference and is subject to our plenary and independent review. However, absent clear legislative intent to the contrary, we do afford deference to a reasonable construction of the statute by the Commissioner because he has policymaking

485 *Id.* at Syl. Pt. 3.

486 452 S.E.2d 436 (W. Va. 1994).

487 *Id.* at Syl. Pt. 1.

488 453 S.E.2d 678 (W. Va. 1994).

authority with regard to the statute.[489]

13. Lawyer Disciplinary Matters

The standard of review by the West Virginia Supreme Court of Appeals in lawyer disciplinary matters was set out in *Committee on Legal Ethics of the West Virginia State Bar v. McCorkle*.[490] In that case Justice Cleckley wrote,

> [a] de novo standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.[491]

14. Decision of Unemployment Compensation Board

The decision in *Adkins v. Gatson* [492] articulated the West Virginia Supreme Court of Appeals' standard of review of unemployment compensation decisions by the board of review of the department of employment security. The opinion held that

> [t]he findings of fact of the Board of Review of the West Virginia Department of Employment Security are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is de novo.[493]

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489 *Id.* at Syl. Pt. 4.

490 452 S.E.2d 377 (W. Va. 1994).

491 *Id.* at Syl. Pt. 3.

492 453 S.E.2d 395 (W. Va. 1994).

493 *Id.* at Syl. Pt. 3.

15. Awarding Attorney Fee as Sanction

It was held in *Bartles v. Hinkle*[494] that "[a]n attorney's fee awarded as a sanction that explicitly is authorized by Rule 37(b) of the West Virginia Rules of Civil Procedure rests in the sound discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal except in cases of abuse."[495]

16. Circuit Court Adoption of Family Law Master Findings

In *Burnside v. Burnside*,[496] Justice Cleckley outlined the West Virginia Supreme Court of Appeals' standard of review of findings made by a family law master and adopted by a circuit court:

> In reviewing challenges to findings made by a family law master that also were adopted by a circuit court, a three-pronged standard of review is applied. Under these circumstances, a final equitable distribution order is reviewed under an abuse of discretion standard; the underlying factual findings are reviewed under a clearly erroneous standard; and questions of law and statutory interpretations are subject to a de novo review.[497]

17. Nonconstitutional Harmless Error Review

The West Virginia Supreme Court of Appeals' standard of review of nonconstitutional error was articulated in *State v. Bradshaw*.[498] *Bradshaw* held, "[i]n the realm of nonconstitutional error, the appropriate test for harmlessness is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence independently was sufficient to support the verdict and that the judgment was not substantially swayed by the error."[499]

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494 472 S.E.2d 827 (W. Va. 1996).

495 *Id.* at Syl. Pt. 4.

496 460 S.E.2d 264 (W. Va. 1995).

497 *Id.* at Syl. Pt. 1.

498 457 S.E.2d 456 (W. Va. 1995).

499 *Id.* at Syl. Pt. 13.

State v. Blake[500] stated,

> [a]ssessments of harmless error are necessarily content-specific. Although erroneous evidentiary rulings alone do not lead to automatic reversal, a reviewing court is obligated to reverse where the improper exclusion of evidence places the underlying fairness of the entire trial in doubt or where the exclusion affected the substantial rights of a criminal defendant.[501]

18. Decision of Tax Commissioner

Frymier-Halloran v. Paige[502] ruled that "[o]nce a full record is developed, both the circuit court and this Court will review the findings and conclusions of the Tax Commissioner under a clearly erroneous and abuse of discretion standard unless the incorrect legal standard was applied."[503]

19. Interpreting Rules of Evidence

In *Gentry v. Mangum*,[504] the court ruled that "[a]n interpretation of the West Virginia Rules of Evidence presents a question of law subject to de novo review."[505]

20. Decision of Successor Judge

In *Tennant v. Marion Health Care Foundation, Inc.*[506] Justice Cleckley announced the standard of review used by the West Virginia Supreme Court of Appeals in its review of a decision by a successor judge. The opinion held,

> [o]nce a successor judge is properly assigned pursuant to Rule 63

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500 478 S.E.2d 550 (W. Va. 1996).

501 *Id.* at Syl. Pt. 4.

502 458 S.E.2d 780 (W. Va. 1995).

503 *Id.* at Syl. Pt. 5.

504 466 S.E.2d 171 (W. Va. 1995).

505 *Id.* at Syl. Pt. 1.

506 459 S.E.2d 374 (W. Va. 1995).

> of the West Virginia Rules of Civil Procedure and Rule XVII of the West Virginia Trial Court Rules for Trial Courts of Record, his or her decision or judgment is to be reviewed on appeal under the same standard that would have been applied to the decision of the original trial judge. To do otherwise would disrupt the administration of justice. To the extent that our prior cases are inconsistent with this decision, they are expressly overruled.[507]

21. Review of an Ineffective Assistance of Counsel Claim

The case of *State v. Miller*[508] addressed the standard of review for a claim of ineffective assistance of counsel:

> In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. ED.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.[509]

The opinion then went on to hold that

> [i]n reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.[510]

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507 *Id.* at Syl. Pt. 1.

508 459 S.E.2d 114 (W. Va. 1995).

509 *Id.* at Syl. Pt. 5.

510 *Id.* at Syl. Pt. 6.

Review of a claim of ineffective assistance of counsel was also the subject in *State ex rel. Daniel v. Legursky*.[511] Justice Cleckley noted in *Daniel* that

> [i]n deciding ineffective of assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. ED.2d 674 (1984), and *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995), but may dispose of such a claim based solely on a petitioner's failure to meet either prong of the test.[512]

It was also held that

> [a] defendant can only obtain reversal on ineffective assistance of counsel grounds if the error complained of occurred at a critical stage in the adversary proceedings. This is true because Section 14 of Article III of the West Virginia Constitution and the Sixth Amendment to the United States Constitution guarantee the right to counsel only at critical stages.[513]

The *Daniel* opinion focused on specific factors concerning a claim of ineffective assistance of counsel:

> The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.[514]

The opinion concluded that

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511 465 S.E.2d 416 (W. Va. 1995).

512 *Id.* at Syl. Pt. 5.

513 *Id.* at Syl. Pt. 6.

514 *Id.* at Syl. Pt. 3.

> [i]n determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, this Court will not view counsel's conduct through the lens of hindsight. Courts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion. Rather, under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices.[515]

22. General Evidentiary and Procedural Rulings

The standard of review for evaluating evidentiary and procedural rulings was touched upon in *McDougal v. McCammon.*[516] Justice Cleckley wrote,

> [t]he West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.[517]

23. Trial Management

State v. Miller[518] held that "[t]o succeed on an abuse of discretion claim regarding the judicial management of a criminal trial, a defendant must point to a specific rule or statutory violation and then must show that the measures or procedures taken by the trial judge either actually or inherently were prejudicial."[519]

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515 *Id.* at Syl. Pt. 4.

516 455 S.E.2d 788 (W. Va. 1995).

517 *Id.* at Syl. Pt. 1.

518 476 S.E.2d 535 (W. Va. 1996).

519 *Id.* at Syl. Pt. 3.

24. Sufficiency of Evidence in Criminal Case

Justice Cleckley took the liberty in *State v. Guthrie*[520] to expand review for a claim of insufficiency of evidence to sustain a criminal conviction. The opinion held initially that:

> The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.[521]

The decision in *Guthrie* then set out specific appellate review guideposts:

> A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.[522]

Justice Cleckley revisited the sufficiency of the evidence in *State v.*

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520 461 S.E.2d 163 (W. Va. 1995).

521 *Id.* at Syl. Pt. 1.

522 *Id.* at Syl. Pt. 3.

LaRock:[523]

> When a criminal defendant undertakes a sufficiency challenge, all the evidence, direct and circumstantial, must be viewed from the prosecutor's coign of vantage, and the viewer must accept all reasonable inferences from it that are consistent with the verdict. This rule requires the trial court judge to resolve all evidentiary conflicts and credibility questions in the prosecution's favor; moreover, as among competing inferences of which two or more are plausible, the judge must choose the inference that best fits the prosecution's theory of guilt.[524]

25. Parole Statute or Double Jeopardy Claim

In *State v. Sears*,[525] Justice Cleckley held that "[b]oth the construction and scope of W. Va. Code, 62-12-13(a)(1)(A) (1988), the parole statute, and a double jeopardy claim are reviewed de novo."[526]

26. Alleged Breach of Plea Agreement

Appellate analysis of an alleged breach of a plea agreement was succinctly addressed in *State ex rel. Brewer v. Starcher*:[527]

> Cases involving plea agreements allegedly breached by either the prosecution or the circuit court present two separate issues for appellate consideration: one factual and the other legal. First, the factual findings that undergird a circuit court's ultimate determination are reviewed only for clear error. These are the factual questions as to what the terms of the agreement were and what was the conduct of the defendant, prosecution, and the circuit court. If disputed, the factual questions are to be resolved initially by the circuit court, and these factual determinations are reviewed

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523 470 S.E.2d 613 (W. Va. 1996).

524 *Id.* at Syl. Pt. 2.

525 468 S.E.2d 324 (W. Va. 1996).

526 *Id.* at Syl. Pt. 1.

527 465 S.E.2d 185 (W. Va. 1995).

> under the clearly erroneous standard. Second, in contrast, the circuit court's articulation and application of legal principles is scrutinized under a less deferential standard. It is a legal question whether specific conduct complained about breached the plea agreement. Therefore, whether the disputed conduct constitutes a breach is a question of law that is reviewed de novo.[528]

27. Review of Challenge to Indictment

In *State v. Miller*,[529] the court ruled that "[g]enerally, the sufficiency of an indictment is reviewed de novo. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by practical rather than technical considerations."[530] The opinion also held,

> Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure requires that a defendant must raise any objection to an indictment prior to trial. Although a challenge to a defective indictment is never waived, this Court literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld unless it is so defective that it does not, by any reasonable construction, charge an offense under West Virginia law or for which the defendant was convicted.[531]

28. Statutory Interpretation Generally

In *West Virginia Human Rights Commission v. Garretson*,[532] Justice Cleckley noted that "[i]nterpreting a statute presents a purely legal question subject to our de novo review on which neither party bears the burden of proof."[533] In *Mills*

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528 *Id.* at Syl. Pt. 1.

529 476 S.E.2d 535 (W. Va. 1996).

530 *Id.* at Syl. Pt. 2.

531 *Id.* at Syl. Pt. 1.

532 468 S.E.2d 733 (W. Va. 1996).

533 *Id.* at Syl. Pt. 1.

v. Van Kirk,[534] Justice Cleckley pieced together several principles to lay down the following rule:

> When interpreting a statute, [t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature. To determine the true intent of the legislature, courts are to examine the statute in its entirety and not select any single part, provision, section, sentence, phrase or word.[535]

29. Review of Administrative Rule or Regulation

The case of *Appalachian Power Co. v. State Tax Department of West Virginia*[536] established this court's review of administrative rules or regulations. Justice Cleckley noted as general matter, that "[i]nterpreting a statute or an administrative rule or regulation presents a purely legal question subject to de novo review."[537] The case held,

> [i]n reviewing a rule or regulation of an administrative agency, a West Virginia court must first decide whether the rule is interpretive or legislative. If it is interpretive, a reviewing court is to give it only the deference it commands. If it is a legislative rule, the court first must determine its validity. Assuming its validity, the two-pronged analysis from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. ED.2d 694 (1984), should be applied.[538]

The opinion in *Appalachian Power* next ruled that

> [j]udicial review of an agency's legislative rule and the construction of a statute that it administers involves two separate but interrelated questions, only the second of which furnishes an occasion for deference. In deciding whether an administrative

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534 453 S.E.2d 678 (W. Va. 1994).

535 *Id.* at Syl. Pt. 2. (internal quotation marks and citations omitted.)

536 466 S.E.2d 424 (W. Va. 1995).

537 *Id.* at Syl. Pt. 1.

538 *Id.* at Syl. Pt. 2.

> agency's position should be sustained, a reviewing court applies the standards set out by the United States Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). The court first must ask whether the Legislature has directly spoken to the precise question at issue. If the intention of the Legislature is clear, that is the end of the matter, and the agency's position only can be upheld if it conforms to the Legislature's intent. No deference is due the agency's interpretation at this stage.[539]

Justice Cleckley concluded *Appalachian Power* by holding,

> [i]f legislative intent is not clear, a reviewing court may not simply impose its own construction of the statute in reviewing a legislative rule. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute. A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious. W.Va. Code, 29A-4-2 (1982).[540]

The case of *West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital*[541] provided further principles involving the review standard of administrative regulations. Justice Cleckley stated that

> [o]nce a disputed regulation is legislatively approved, it has the force of a statute itself. Being an act of the West Virginia Legislature, it is entitled to more than mere deference; it is entitled to controlling weight. As authorized by legislation, a legislative rule should be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.[542]

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539 *Id.* at Syl. Pt. 3.

540 *Id.* at Syl. Pt. 4.

541 472 S.E.2d 411 (W. Va. 1996).

542 *Id.* at Syl. Pt. 2.

It was further said that

> [i]f the language of an enactment is clear and within the constitutional authority of the law-making body which passed it, courts must read the relevant law according to its unvarnished meaning, without any judicial embroidery. Even when there is conflict between the legislative rule and the initial statute, that conflict will be resolved using ordinary canons of interpretation.[543]

30. Findings and Conclusions of Circuit Court

Justice Cleckley laid down the general rule regarding review of findings of fact made by a circuit court in the case of *In re Tiffany Marie S.*:[544]

> Although conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court unless clearly erroneous. A finding is clearly erroneous when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety.[545]

In *State ex rel. Cooper v. Caperton*,[546] Justice Cleckley qualified the general rule regarding the standard of review of findings of fact. *Cooper* stated,

> [g]enerally, findings of fact are reviewed for clear error and

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543 *Id.* at Syl. Pt. 3.

544 470 S.E.2d 177 (W. Va. 1996).

545 *Id.* at Syl. Pt. 1.

546 470 S.E.2d 162 (W. Va. 1996).

> conclusions of law are reviewed de novo. However, ostensible findings of fact, which entail the application of law or constitute legal judgments which transcend ordinary factual determinations, must be reviewed de novo. The sufficiency of the information presented at trial to support a finding that a constitutional predicate has been satisfied presents a question of law.[547]

Additionally, in *Brown v. Gobble*,[548] a specific test was developed for determining when the West Virginia Supreme Court of Appeals would not defer to the findings of a trial court. Justice Cleckley indicated that

> [t]he deference accorded to a circuit court sitting as factfinder may evaporate if upon review of its findings the appellate court determines that: (1) a relevant factor that should have been given significant weight is not considered; (2) all proper factors, and no improper factors, are considered, but the circuit court in weighing those factors commits an error of judgment; or (3) the circuit court failed to exercise any discretion at all in issuing its decision.[549]

In *Public Citizen, Inc. v. First National Bank in Fairmont*,[550] the court held that

> [i]n reviewing challenges to the findings and conclusions of the circuit court made after a bench trial, a two-pronged deferential standard of review is applied. The final order and the ultimate disposition are reviewed under an abuse of discretion standard, and the circuit court's underlying factual findings are reviewed under a clearly erroneous standard. Questions of law are subject to a de novo review.[551]

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547 *Id.* at Syl. Pt. 1.

548 474 S.E.2d 489 (W. Va. 1996).

549 *Id.* at Syl. Pt. 1.

550 480 S.E.2d 538 (W. Va. 1996).

551 *Id.* at Syl. Pt. 1.

31. Civil Service Commission

The case of *In re Queen*[552] was used by Justice Cleckley to address the standard of review used for the civil service commission of correctional officers:

> An adjudicative decision of the Correctional Officers' Civil Service Commission should not be overturned by an appellate court unless it was clearly erroneous, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Review under this standard is narrow and the reviewing court looks to the Civil Service Commission's action to determine whether the record reveals that a substantial and rational basis exists for its decision.[553]

It was also said that

> [a]n appellate court may reverse a decision of the Correctional Officers' Civil Service Commission as clearly wrong or arbitrary or capricious only if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that was so implausible that it could not be ascribed to a difference in view or the product of Commission expertise.[554]

Queen stated that "[t]he 'clearly wrong' and the 'arbitrary and capricious' standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis."[555] *Queen* further held that "'[s]ubstantial evidence' requires more than a mere scintilla. It is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. If an administrative agency's factual finding is supported by substantial evidence, it is conclusive."[556]

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552 473 S.E.2d 483 (W. Va. 1996).

553 *Id.* at Syl. Pt. 1.

554 *Id.* at Syl. Pt. 2.

555 *Id.* at Syl. Pt. 3.

556 *Id.* at Syl. Pt. 4.

C. *Preserving Issue for Appeal*

In *State v. Honaker*,[557] Justice Cleckley addressed the prerequisites for preserving two specific issues for appellate review. The opinion held that "[t]o raise and preserve for appellate review the claim of improper impeachment of the defendant or improper rebuttal by the use of prejudicial collateral evidence, a defendant must testify or the rebuttal evidence must be introduced at trial."[558] The case of *McDougal v. McCammon*[559] held that "[i]n order to preserve for appeal the claim of unfair surprise as the basis for the exclusion of evidence, the aggrieved party must move for a continuance or recess."[560] As a general matter, in *State ex rel. Cooper v. Caperton*,[561] the court held that "[t]o preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect."[562]

D. *Writ of Prohibition*

In *State ex rel. Hoover v. Berger*,[563] the opinion set out factors the West Virginia Supreme Court of Appeals considers in determining whether to issue a writ of prohibition:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous

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557 454 S.E.2d 96 (W. Va. 1994).

558 *Id.* at Syl. Pt. 5.

559 455 S.E.2d 788 (W. Va. 1995).

560 *Id.* at Syl. Pt. 4.

561 470 S.E.2d 162 (W. Va. 1996).

562 *Id.* at Syl. Pt. 2.

563 483 S.E.2d 12 (W. Va. 1996).

> as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.[564]

Seeking a writ of prohibition to quash a subpoena was touched upon in *State ex rel. Doe v. Troisi*.[565] The case held in that case that "[i]n situations where the refusal of a motion to quash a subpoena based on the attorney-client privilege could result in imminent and irreparable harm, petitioning for a writ of prohibition is the appropriate method for challenging the subpoena."[566]

Use of the writ of prohibition was addressed in *State ex rel. U.S. Fidelity and Guaranty Co. v. Canady*.[567] In that case Justice Cleckley held that "[w]hen a discovery order involves the probable invasion of confidential materials that are exempted from discovery under Rule 26(b)(1) and (3) of the West Virginia Rules of Civil Procedure, the exercise of this Court's original jurisdiction is appropriate."[568]

E. Writ of Mandamus

Issues involving the writ of mandamus were addressed in *Gribben v. Kirk*.[569] *Gribben* stated that "[m]andamus will lie against a State official to adjust prospectively his or her conduct to bring it into compliance with any statutory or constitutional standard."[570] The opinion also ruled that "[t]he crucial date for

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564 *Id.* at Syl. Pt. 4.

565 459 S.E.2d 139 (W. Va. 1995).

566 *Id.* at Syl. Pt. 2.

567 460 S.E.2d 677 (W. Va. 1995).

568 *Id.* at Syl. Pt. 3.

569 466 S.E.2d 147 (W. Va. 1995).

570 *Id.* at Syl. Pt. 2.

drawing a line between prospective and retroactive relief should be the initiation of the relevant mandamus action and not the date of judgment."[571]

Justice Cleckley took the opportunity to outline the test for granting a writ of mandamus in *State ex rel. Sowards v. County Commission of Lincoln County*.[572] The opinion held that

> [m]andamus is a drastic remedy to be invoked only in extraordinary situations; therefore, a party seeking such a writ must satisfy three conditions: (1) there are no adequate means for the party to obtain the desired relief; (2) the party has a clear and indisputable right to the issuance of the writ; and (3) there is a legal duty on the part of the respondent to do that which the petitioner seeks to compel.[573]

It was said in *State ex rel. School Building Authority of West Virginia v. Marockie*[574] that

> [a] writ of mandamus is a proper method of testing the legality of a bond issue before the bonds are actually issued where the issue presented is one for which there has been a tradition of judicial accessibility and where immediate judicial access would play a significant and positive role in the resolution of the particular constitutional problem in question.[575]

F. Plain Error Rule

The plain error rule was established in *State v. Miller*.[576] Justice Cleckley held that "[t]o trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the

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571 *Id.* at Syl. Pt. 3.

572 474 S.E.2d 919 (W. Va. 1996).

573 *Id.* at Syl. Pt. 2.

574 481 S.E.2d 730 (W. Va. 1996).

575 *Id.* at Syl. Pt. 2.

576 459 S.E.2d 114 (W. Va. 1995).

fairness, integrity, or public reputation of the judicial proceedings."[577] The opinion then went on to make a distinction between "waiver" and "forfeiture" in the context of the plain error doctrine:

> Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right – the failure to make timely assertion of the right – does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."[578]

Miller concluded by explaining the import of the third factor in its plain error test:

> Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.[579]

The decision in *State v. LaRock*[580] elaborated further on the plain error rule:

> An unpreserved error is deemed plain and affects substantial rights only if the reviewing court finds the lower court skewed the fundamental fairness or basic integrity of the proceedings in some major respect. In clear terms, the plain error rule should be

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577 *Id.* at Syl. Pt. 7.

578 *Id.* at Syl. Pt. 8.

579 *Id.* at Syl. Pt. 9.

580 470 S.E.2d 613 (W. Va. 1996).

> exercised only to avoid a miscarriage of justice. The discretionary authority of this Court invoked by lesser errors should be exercised sparingly and should be reserved for the correction of those few errors that seriously affect the fairness, integrity, or public reputation of the judicial proceedings.[581]

The plain error rule was refined further in *State v. Marple*.[582] "For the purposes of West Virginia's 'plain error' rule, a 'plain' error is one that is clear and uncontroverted at the time of appeal."[583] The opinion also held that

> [i]n determining whether the assigned plain error affected the 'substantial rights' of a defendant, the defendant need not establish that in a trial without the error a reasonable jury would have acquitted; rather, the defendant need only demonstrate the jury verdict in his or her case was actually affected by the assigned but unobjected to error.[584]

Marple concluded by holding that

> [p]lain error review creates a limited exception to the general forfeiture policy pronounced in Rule 103(a)(1) of the West Virginia Rules of Evidence, in that where a circuit court's error seriously affects the fairness, integrity, and public reputation of the judicial process, an appellate court has the discretion to correct error despite the defendant's failure to object. This salutary and protective device recognizes that in a criminal case, where a defendant's liberty interest is at stake, the rule of forfeiture should bend slightly, if necessary, to prevent a grave injustice.[585]

It was said in *State v. Crabtree*[586] that

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581 *Id.* at Syl. Pt. 7.

582 475 S.E.2d 47 (W. Va. 1996).

583 *Id.* at Syl. Pt. 2.

584 *Id.* at Syl. Pt. 3.

585 *Id.* at Syl. Pt. 1.

586 482 S.E.2d 605 (W. Va. 1996).

> [t]he first inquiry under the "plain error rule" codified in Rule 52(a) of the West Virginia Rules of Criminal Procedure is whether "error" in fact has been committed. Deviation from a rule of law is error unless it is waived. Waiver is the intentional relinquishment or abandonment of a known right. When there has been such a knowing waiver, there is no error and the inquiry as to the effect of the deviation from a rule of law need not be determined.[587]

G. *Cumulative Error Doctrine*

Application of the cumulative error doctrine in civil litigation was addressed in *Tennant v. Marion Health Care Foundation, Inc.*[588] The opinion held that "[t]he cumulative error doctrine may be applied in a civil case when it is apparent that justice requires a reversal of a judgment because the presence of several seemingly inconsequential errors has made any resulting judgment inherently unreliable."[589]

XXI. CONSTITUTIONAL LAW

A. *Free Speech Clause*

The case of *In re Hey*[590] provided Justice Cleckley with an opportunity to construe the constitutional right of free speech for judicial officials:

> A judge may not be disciplined consistent with the First Amendment to the United States Constitution or with Section 7 of Article III of the West Virginia Constitution for his remarks during a radio interview in which he discussed his own disciplinary proceeding, criticized a member of his investigative panel, and stated his intention to take some reactive and lawful measure against the panel member.[591]

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587 *Id.* at Syl. Pt. 6.

588 459 S.E.2d 374 (W. Va. 1995).

589 *Id.* at Syl. Pt. 8.

590 452 S.E.2d 24 (W. Va. 1994).

591 *Id.* at Syl. Pt. 4.